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In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*
Respondent.

ORDER OF NEW YORK COURT OF APPEALS TO RESPONDENT TO SHOW CAUSE WHY ITS REMITTITUR SHOULD NOT BE AMENDED

HENRY E. FOLEY,
Counsel for Petitioner

GEORGE H. DEAN CO., PRINTERS, BOSTON

In the Court of Appeals of the State of New York

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all other Employees of the Defendant similarly situated,*

Respondent,

—against—

J. F. FITZGERALD CONSTRUCTION COMPANY,
Appellant.

Upon the annexed affidavit of Charles E. Nichols, the record on appeal herein, the remittitur of this Court herein dated June 14, 1944, and upon all papers and proceedings herein, and on motion of Whalen, McNamee, Creble & Nichols, attorneys for the appellant, it is

ORDERED, that the above named respondent show cause before this Court at its court room in the Court of Appeals Hall in the City of Albany, New York on November 20, 1944, at 2:00 P. M. why this Court should not make an order herein requesting a return of the remittitur herein to said Court, and that said remittitur be amended by including therein and adding thereto at the end of the third paragraph thereof the following:

"Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts

states a prima facie case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant acquired the burden, which it failed to sustain, of establishing the nature of the employment of the individual respondents."

and why this Court should not grant such other, further and different relief in the premises as may be proper.

Service of a copy of this order together with a copy of the annexed affidavit, either personally or by mail, upon respondent's attorneys on or before November 14, 1944, shall be deemed sufficient.

Dated: November 13, 1944.

IRVING LEHMAN,
Chief Judge

In the Court of Appeals of the State of New York

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all other Employees of the Defendant similarly situated,*

Respondent,

—against—

J. F. FITZGERALD CONSTRUCTION COMPANY,

Appellant.

AFFIDAVIT OF CHARLES E. NICHOLS, ESQ. IN SUPPORT OF MOTION TO AMEND REMITTITUR

STATE OF NEW YORK
COUNTY OF ALBANY } ss.:

Charles E. Nichols, being duly sworn, deposes and says:

I am a member of the firm of Whalen, McNamee, Creble and Nichols, attorneys for the defendant-appellant herein, and I am familiar with all proceedings in the above-entitled action.

This affidavit is submitted in support of the application of the defendant-appellant for an order amending the remittitur herein by including therein or adding thereto, at the end of the third paragraph thereof, a statement indicating that the federal question raised by the appellant in this Court was decided by this Court.

Plaintiff originally sued in the Supreme Court, Columbia County, to recover overtime compensation and liquidated damages under Sec. 16(b) of the Fair Labor Standards Act

of 1938. The case was tried on an agreed statement of facts which has never been altered and which shows that during the period for which overtime compensation is sought, plaintiffs were employed in doing work under defendant's contract to repair an instrumentality of commerce. Judgment dismissing plaintiff's complaint was entered in the Trial Term, and was subsequently affirmed by the Appellate Division, Third Department, and by this Court. Plaintiff then petitioned in the United States Supreme Court for a writ of certiorari. Certiorari was granted and the judgment reversed. Upon consideration of a petition for rehearing subsequently filed in the United States Supreme Court by defendant, the Supreme Court modified its earlier decision by stating that the reversal was "without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit was brought." Upon remand of the case to the Trial Term, defendant moved for dismissal and plaintiff for summary judgment under Rule 113 of the Civil Practice Act. Plaintiff's motion was granted, with costs and interest; defendant's motion was denied. The Appellate Division, Third Department, affirmed the entry of judgment for the plaintiff and the dismissal of defendant's motion.

This matter came on to be heard by this Court upon the defendant's appeal from said judgment of the Appellate Division, Third Department. In affirming said judgment on June 14, 1944 this Court, in an opinion by Judge Loughran, reviewed the history of the proceedings and then said: (293 N. Y. 126)

> "The case was originally submitted upon an agreed statement of facts which has never been altered in any way. It is thereby stipulated that the work on which the plaintiffs' claims are based was done by them under a contract through which the defendant undertook with a

railroad company to reconstruct two bridges that were instrumentalities of interstate commerce. (262 App. Div. 665, 667). These conceded facts are now said by the defendant to be insufficient as a basis for disposition of the issue as to whether the plaintiffs were 'engaged in commerce' at the time they were so employed.

"We concur with the courts below in their rejection of that contention. The agreed statement of facts on the face of it was a case within the statute. (*McLeod* v. *Threlkeld*, 319 U. S. 491, 494). No other or different showing was attempted by the defendant on the present motions, despite the proviso we have quoted from the mandate of the higher court. On the record as it stood, a summary judgment for the plaintiffs was inevitable."

Subsequent to the decision in this case by this Court, the appellant duly applied to the United States Supreme Court for a writ of certiorari for the purpose of having the United States Supreme Court determine whether (1) the entry of judgment for the plaintiffs on the record in this case is in conflict with the decisions of the United States Supreme Court interpreting the Fair Labor Standards Act of 1938 and with the prior mandate of the United States Supreme Court in these proceedings, and (2) whether interest may be added to the statutory double damages awarded an employee in an action brought under the federal act.

Notwithstanding the aforequoted clear and unequivocally stated grounds of decision in the opinion of this Court, the plaintiffs-respondents, in their brief in opposition to the granting of petitioner's petition for writ of certiorari by the United States Supreme Court, argued that this Court, in ordering the affirmance of the judgment of the Appellate Division, had rested its decision wholly upon grounds of New York civil procedure. The plaintiffs-respondents have argued to the United States Supreme Court, both directly and impliedly, that while their case might have been deemed insufficiently proved, had defendant supplied an answering

affidavit under Rule 113 of the New York Civil Practice Act, this Court's decision is to be taken as meaning that defendant's failure to submit such affidavit, averring the existence of a defense, cures the plaintiff's deficiency of proof under New York local, procedural law. Thus the plaintiffs state, at pages 9 and 10 of their brief, opposing the granting of certiorari:

> "The only issue determined by the state courts, and the only issue presented to this Court, is one of civil procedure. The petitioner herein could easily have required of the plaintiff proof of the details of each workers' duties, by merely interposing on the motion for summary judgment a short answering affidavit. The failure to file any answering affidavit whatsoever resulted, as Judge Loughran stated, in (R. 64): 'No other or different showing was attempted by the defendant on the present motions, despite the proviso we have quoted from the mandate of the higher court. On the record as it stood, a summary judgment for the plaintiffs was inevitable.' "

On November 6, 1944, the United States Supreme Court granted defendant's petition for a writ of certiorari herein, but limited the review upon certiorari to the second question, namely, that concerning interest, as set forth in defendant's petition. Thus, the defendant-appellant herein has been denied the right to obtain final determination by the United States Supreme Court of the federal question presented and decided by this Court, due to the interpretation of the nature of this Court's decision as presented to the Supreme Court by the argument of plaintiffs-respondents.

I am informed, however, by the Office of the Clerk of the United States Supreme Court that an application for removal of the limitation upon the grant of certiorari will be considered by that Court, provided such petition is duly filed on or before December 1, 1944. Defendant-appellant

intends to make such application. Accordingly it is of the greatest importance that before said last-mentioned date an order be made by this Court showing that the aforementioned federal question was decided by this Court and that the basis of decision was not, as the plaintiff has argued, the defendant's failure to aver by affidavit the existence of a triable issue under Rule 113 of the Civil Practice Act.

The afore-quoted language from this Court's opinion clearly shows that such federal question was decided.

The proposed addition to the remittitur, which defendant requests be incorporated therein, does not effect any modification or alteration of this Court's opinion. It is requested solely for the purpose of negativing the impression, created by plaintiff's brief in opposition to certiorari in the United States Supreme Court that this Court's decision was placed solely upon local procedural grounds rather than those stated in its opinion.

The remittitur of this Court herein was filed in the office of the Clerk of the County of Columbia on June 22, 1944.

That because of the necessity for a prompt hearing in this Court, sufficient time does not remain in which to serve the usual notice of motion returnable at the next motion day of this Court on the 20th instant, and accordingly deponent requests an order to show cause returnable before this Court on said date, requiring plaintiff to show cause why the remittitur herein should not be amended by adding thereto the following:

> "Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts

states a prima facie case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant acquired the burden, which it failed to sustain, of establishing the nature of the employment of the individual respondents."

CHARLES E. NICHOLS

Subscribed and sworn to before
me this 13th day of November, 1944

E. MAE KINGSTON
Notary Public—Albany County, N. Y.